BLANK PA

BLANK PAGE

INDEX

CITATIONS

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 26, 1939. (R. 55.)[1] The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 117 (d) of the Revenue Act of 1934 permits losses sustained by the husband from the sale of capital assets to be deducted to the extent of the wife's gains from similar sales where a joint return is filed.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and regulations will be found in the Appendix, *infra*, pp. 9–12.

STATEMENT

The facts as stipulated (R. 14–34) and as found by the Board of Tax Appeals (R. 35–37) are substantially as follows:

The taxpayers are husband and wife, residing at Bryn Mawr, Pennsylvania, and were living together throughout the year 1934. (R. 14, 36.)

During that year the wife, Pauline F. M. Janney, realized gains from the sale of capital assets in the amount of $127,501.02. The amount of such gains

---

[1] Through error the date of the judgment is given as December 26, 1940, but the Clerk's endorsement shows that the judgment was entered and filed on December 26, 1939.

to be taken into account under Section 117 (a) of the Revenue Act of 1934 was $94,491. During the year 1934 the husband, Walter C. Janney, suffered losses from the sale of capital assets in the amount of $229,544.66, of which the amount to be taken into account under Section 117 (a) of the Revenue Act of 1934 was $91,963.35. (R. 14–16, 36.)

The taxpayers filed a joint return for the year 1934. In the return the capital gains of the wife in the amount of $94,491 were included in gross income and the capital losses of the husband in the amount of $91,963.35 were deducted. (R. 17, 37.)

In auditing the return the Commissioner refused to permit the losses sustained by the husband to be offset against the gains realized by the wife and on the basis of that disallowance and of another adjustment not here involved determined a deficiency of $37,109.29. (R. 9, 35.) The Board of Tax Appeals sustained the Commissioner's determination as to the disallowance of the loss claimed under Section 117 (a) and determined a deficiency of $36,700.60. (R. 40, 41.) The Circuit Court of Appeals reversed the Board.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 117 (d) of the Revenue Act of 1934, either alone or in conjunction with Section 51 (b) (2), permits losses sustained by one spouse on the sale of capital assets to be applied against the gains of the other spouse from similar sales, provided a joint return is filed.

2. In not holding that under Section 117 (d) and Section 51 (b) (2) a loss sustained on the sale of capital assets by one spouse is deductible only to the extent of his or her gains from similar sales (plus $2,000), even though a joint return is filed.

3. In not holding that the deductions which may be entered in the joint return are those to which each spouse, separately considered, is entitled.

4. In not holding that regulations promulgated under Section 51 (b) (2) and Section 117 (d) of the Revenue Act of 1934 were valid regulations which controlled the disposition of this case.

5. In holding that Article 117–5 of Regulations 86 is inconsistent with Section 51 (b) (2) of the Revenue Act of 1934 and invalid.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in substantial conflict with the decisions of the Circuit Court of Appeals for the Second Circuit in *Pierce* v. *Commissioner,* 100 F. (2d) 397, and *Demuth* v. *Commissioner,* 100 F. (2d) 1012, certiorari denied, 307 U. S. 627, with the decision of the Circuit Court of Appeals for the First Circuit in *Sweet* v. *Commissioner,* 102 F. (2d) 103, certiorari denied, 307 U. S. 627, and with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Nelson* v. *Commissioner,* 104 F. (2d) 521. Those cases involved Section 23 (r) of the Revenue Act of 1932 which allowed losses upon sale of securities constituting noncapital assets only to the extent of gains from

similar sales, and in those cases the courts held that the filing of a joint return did not authorize one spouse to apply such losses against the gains of the other.

The present case involves cognate provisions in Section 117 (d) of the Revenue Act of 1934 which limit losses upon sale of capital assets to the extent of capital gains plus $2,000. And in ruling that the capital losses of one spouse could be applied against the capital gains of the other, the court below recognized that it was departing from the holdings of the *Pierce, Demuth, Sweet,* and *Nelson* cases (R. 52–53).

2. This case presents an important question in the administration of the federal income tax laws because the court below has held invalid an applicable treasury regulation, and has failed to give effect to another, each of which requires a contrary result here.

(a) Article 117–5 of Regulations 86, promulgated under the Revenue Act of 1934, unambiguously provides:

> In the application of section 117, a husband and wife, regardless of whether a joint return or separate returns are made, are considered to be separate taxpayers. Accordingly, the limitation under section 117 (d) on the allowance of losses of one spouse from sales or exchanges of capital assets is in all cases to be computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets.

The regulations issued under subsequent revenue acts reach substantially the same result. See Article 117-5 of Regulations 94 (1936 Act); Article 117-5 of Regulations 101 (1938 Act); Section 19.117-5 of Regulations 103 (Int. Rev. Code). The court below specifically declared these provisions invalid.[2] (R. 53-54.) It is, therefore, essential to the orderly administration of the statute to have an authoritative determination of whether these provisions run afoul of the statute.

(b) Moreover, the court below has failed to give effect to Article 51-1 of Regulations 86 (Appendix, *infra*, p. 10), which provides that if the spouses file a joint return, the tax is computed on the aggregate income, and "all deductions and credits to which *either* is entitled shall be taken from such aggregate income." [Italics supplied.] These provisions

---

[2] In refusing to follow Article 117-5 of Regulations 86, the court below noted that Section 51 (b) was amended in 1938, and thought that this indicated an intention of Congress not to approve these regulations (R. 54). There are, however, two conclusive answers to any argument based upon the 1938 modification of Section 51 (b):

First, the 1938 modification was directed at a wholly different question and left the present question untouched. The change in 1938 was intended merely to impose joint and several liability upon the spouses in the *collection* of the tax, thus remedying the loophole thought to be present in preexisting law in such cases as *Cole* v. *Commissioner*, 81 F. (2d) 485 (C. C. A. 9th), and *Crowe* v. *Commissioner*, 86 F. (2d) 796 (C. C. A. 7th).

Second, in any event, Article 117-5 was in effect in 1936 when Congress reenacted the applicable provisions without disapproving the administrative construction under the 1934 Act, here involved. Cf. *Hassett* v. *Welch*, 303 U. S. 303.

had been in effect for many years,[3] and were regarded as applicable in the *Pierce* decision. 100 F. (2d) at 398. In accordance with the familiar rule, the repeated reenactment of the statutory provisions should be taken as evidencing legislative approval of these regulations.[4]

Under these regulations, the deductions to which either spouse is entitled may be taken against their consolidated income in a joint return. And even though one spouse has no income to absorb his or her deduction, that deduction is nevertheless available to offset the income of the other. In other words, the filing of a joint return may increase the availability of a deduction, *but it cannot serve to create a deduction which would not otherwise have been allowable.* See *Gummey* v. *Commissioner,* 26 B. T. A. 894. Here, the very question in issue is whether Mr. Janney was entitled to the claimed deduction, and we submit that under Section 117 (d), there was no deduction which he could have taken. The decision below, in effect, requires both spouses to be treated as a single person where a joint return is filed. Such result is not only in conflict with the regulations but is contrary to the implications of such cases as *Van Vleck* v. *Commissioner,* 80 F. (2d) 217 (C. C. A. 2d), certiorari denied, 298 U. S.

---

[3] See Article 401 of Regulations 65 and 69, promulgated under the Revenue Acts of 1924 and 1926, respectively; Article 381 of Regulations 74 and 77, promulgated under the Revenue Acts of 1928 and 1932, respectively.

[4] Cf., e. g., *Helvering* v. *Winmill,* 305 U. S. 79.

656 [5] (net loss carry-over of one spouse may not be applied against income of the other).

CONCLUSION

In view of the conflict of decisions and the general importance of the question presented, it is respectfully submitted that the petition should be granted.

ROBERT H. JACKSON,
Attorney General.

MARCH, 1940.

---

[5] Compare the decisions holding that where one spouse sells property to another, the loss (in the absence of any statute prohibiting the deduction) may be deductible in their joint return. *Commissioner* v. *Thomas*, 84 F. (2d) 562 (C. C. A. 5th); *Commissioner* v. *Brumder*, 82 F. (2d) 944 (C. C. A. 7th); *Hill* v. *United States*, 12 F. Supp. 798 (C. Cls).

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 23. DEDUCTIONS FROM GROSS INCOME. In computing net income there shall be allowed as deductions:—

* * * * *

(j) *Capital Losses.*—Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in section 117 (d).

* * * * *

(U. S. C., Title 26, Sec. 23.)

SEC. 51. INDIVIDUAL RETURNS.

* * * * *

(b) *Husband and Wife.*—If a husband and wife living together have an aggregate net income for the taxable year of $2,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

* * * * *

(U. S. C., Title 26, Sec. 51.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

* * * * *

(d) *Limitation on Capital Losses.*—Losses from sales or exchanges of capital assets shall be allowed only to the extent of $2,000 plus the gains from such sales or exchanges. If a bank or trust company incorporated under the laws of the United States or of any State or Territory, a substantial part of whose business is the receipt of deposits, sells any bond, debenture, note, or certificate or other evidence of indebtedness issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, any loss resulting from such sale (except such portion of the loss as does not exceed the amount, if any, by which the adjusted basis of such instrument exceeds the par or face value thereof) shall not be subject to the foregoing limitation, and shall not be included in determining the applicability of such limitation to other losses.

* * * * *

(U. S. C., Title 26, Sec. 101.)

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 51-1. *Individual returns.*—For each taxable year every single person and every

married person not living with husband or wife for any part of the taxable year, whose gross income as defined in sections 22 and 116 is $5,000 or over, or whose net income as defined in section 21 is $1,000 or over, must make a return of income. Every married person living with husband or wife for any part of the taxable year, but not at the close of the taxable year, must make a return if his gross income for the taxable year is $5,000 or more, or his net income is equal to, or in excess of, the credit allowed him by section 25 (b) (1) and (3) (computed without regard to his status as the head of a family). (See article 25–7.) A husband and wife living together for the entire year need make no returns unless their aggregate gross income for the taxable year is at least $5,000, or their aggregate net income is at least $2,500. If their aggregate net income for the taxable year is $2,500 or more, or their aggregate gross income is $5,000 or more, either each must make a return, or the income of each must be included in a single joint return. A husband and wife living together at the close of the taxable year but not during the entire taxable year must make a return or returns if their aggregate gross income for the taxable year is $5,000 or more, or their aggregate net income is equal to, or in excess of, the credit allowed them by section 25 (b) (1) and (3) (computed without regard to the status of either of them as the head of a family). (See article 25–7.) If the income of each is included in a single joint return, the tax is computed on the aggregate income and all deductions and credits to which either is entitled shall be taken from such aggregate income. A joint return of husband and wife may be filed only

if they were living together at the close of their taxable year. If one spouse dies prior to the last day of the taxable year, the surviving spouse may not include the income of the deceased spouse in a joint return for such taxable year.

* * * * *

ART. 117–5. *Application of section 117 in the case of husband and wife.*—In the application of section 117, a husband and wife, regardless of whether a joint return or separate returns are made, are considered to be separate taxpayers. Accordingly, the limitation under section 117 (d) on the allowance of losses of one spouse from sales or exchanges of capital assets is in all cases to be computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets.

U. S. GOVERNMENT PRINTING OFFICE: 1940

BLANK PAGE